

STATEMENT OF THE CASE

Robert J. Bassett, Jr. appeals his conviction, after a jury trial, of conspiracy to commit murder, a class A felony.

We affirm.

ISSUES

1. Whether the trial court committed fundamental error when it allowed the admission of evidence that at the time of the alleged offense, Bassett was awaiting trial on four counts of murder.
2. Whether Bassett's convictions must be reversed because the trial court allowed a witness to testify regarding out of court statements.
3. Whether the evidence was sufficient to support Bassett's conviction for conspiracy to commit murder.
4. Whether Bassett was denied the effective assistance of counsel.

FACTS

The evidence favorable to the verdict reveals that during the fall and winter of 2004, Bassett was being held in the Bartholomew County jail, awaiting trial on four counts of murder. Also during that period, Chief Deputy Prosecutor Kathleen Burns was finalizing preparations for Bassett's trial. Burns had been the primary prosecuting attorney assigned to Bassett's case since 1998.

On September 13, 2004, Clarence Douglas Johnson ("Doug") and his girlfriend Lisa Walker ("Lisa") were arrested on methamphetamine-related charges. Doug was placed in the cell with Bassett. Lisa was housed in a cell that shared a common wall with that of Doug and Bassett. For three months, Doug and Lisa carried on constant communication -- verbal and written -- via a hole in the common cell wall and also an

opening alongside the cell doors. A frequent topic of their conversation, heard by Bassett, was the collection of funds to post their respective bonds. He learned that Doug and Lisa had only raised sufficient funds to post bond for one of them.

Bassett proposed “a plan”: “if [Doug] bonded out first,” and upon release, “kill[ed] [Bassett’s] nephew, Jessie Bassett,” then Bassett would “come up with” \$10,000.00 “to get Lisa out of jail.” (Tr. 231). Bassett “didn’t want [his nephew Jessie] to testify in court” at his pending trial. (Tr. 232). Doug told Lisa about Bassett’s proposal. Subsequently, when Bassett’s “attorney told him that he could get Jessie’s testimony” discredited at trial, Bassett changed his murder target, telling Doug that he “wanted [him] to kill Kathleen Burns” for the \$10,000.00. *Id.* Bassett felt Burns had been “relentless” in “not let[ting] up on the case,” and that he might be acquitted “if he got a different prosecuting attorney.” (Tr. 233). Bassett told Doug that he would get the money to pay him from his sister, who was holding money for him in her account. Knowing that Bassett “was awaiting trial on four counts of murder,” Doug “just agreed with” and “went along with” what his cellmate “wanted [him] to do,” but Doug had no intention of actually killing Burns. (Tr. 235). Doug told Lisa that Bassett now wanted him to kill Burns.

In October of 2004, with Lisa’s agreement, Doug wrote a letter to Burns stating that he had information obtained from Bassett that it was “important that [she] know,” and whether she could “help [them] or not.” (Ex. A). Doug received no response to the letter. On December 13, 2004, Doug posted his bond and was released from jail. While Doug was packing to depart, Bassett “said that as soon as [he] got home, . . . he wanted to

talk to [him] about what [they]’d discussed about killing Kathleen Burns.” (Tr. 238). Within minutes of arriving home, Doug received a call from Bassett “wanting to know if the deal still stood . . . about killing Kathleen Burns,” and telling Doug that he would be arranging to obtain the money for Lisa’s bond. (Tr. 239). Bassett called several more times that day, but Doug did not accept the calls.

On December 15th and 16th, Doug placed calls for Burns at her office; unable to reach her, he left messages asking that she call him back. Finally, late on December 16th, Doug was able to speak with Burns. Doug told Burns that Bassett “asked [him] to try and murder her.” (Tr. 241). Burns notified Officer Gorbett, who contacted Doug later that day. On December 17th, Gorbett installed a recording device on Doug’s telephone. On December 19th, 20th, and 21st, Bassett called Doug five times, and the conversations were recorded.

On December 20th, Doug told Bassett that he would “whack that f*ing Burns in the head” for “a thousand dollars . . . if” Bassett would “guarantee” the money. (Ex. 3, p. 2). Bassett responded that if his sister, who was keeping money for him, “says yeah, then that’s guaranteed.” *Id.* at p. 3. In later conversations, Bassett told Doug that his sister said that she spent all of his money. Bassett complained about how Burns “just wo[uld]n’t quit” her pursuit in his case, starting “from the beginning . . . six years ago.” (Ex. 5, pp. 7, 21). Bassett stated that if the State had to use another prosecutor “that don’t know nothing [sic] about the case they would probably have to drop the charges on [him].” *Id.* at p. 7. Doug asked whether if he made “something . . . happen to ’ol Burns” without being paid “right now,” could Bassett pay him afterward? *Id.* at p. 26. Bassett responded

that he “kn[e]w” he could get the money “from [his] boss.” *Id.* Bassett then warned Doug to “n[o]t talk about all this on the phone.” *Id.* at 27. On the last recorded conversation, Doug asked whether “if [he] f*g done her in,” Bassett was “sure [he] could get paid.” (Ex. 6, p. 13). Bassett responded, “There ain’t no doubt in my mind. But you don’t need to be talking about nothing [sic] like that on this phone.” *Id.*

On January 21, 2005, the State charged Bassett with conspiracy to commit murder, a class A felony, and being an habitual offender. On February 9, 2007, the State filed a motion seeking a pretrial evidentiary hearing. Therewith, it submitted a memorandum of law arguing the admissibility of certain evidence¹ to establish Bassett’s motive to commit conspiracy to murder Burns and the context of the crime. At a hearing on February 27, 2007, the trial court heard arguments on the motion, and it held that the State would be permitted at trial to introduce the evidence requested.

Also at the hearing on February 27th, the trial court heard arguments regarding the admissibility of testimony by Lisa as to Doug’s out-of-court statements to her regarding the conspiracy. The trial court deferred ruling thereon.

On March 6, 2007, the jury trial of Bassett commenced. Without objection from Bassett, the first witness, Officer Gorbett, testified that during the latter part of 2004,

¹ Specifically, the State sought to introduce the following evidence: that in late 2005, Bassett was in jail awaiting trial on four counts of murder he was alleged to have committed in August of 1998; that at that time, Burns (who had long been assigned the case) was preparing to take the murder case to trial; that Bassett wanted Burns killed because he believed he could avoid prosecution if the State were forced to assign another prosecutor without her long experience with the case; that Bassett had originally sought the murder of his nephew, Jessie Bassett; that Bassett wanted Jessie killed because he had recanted his original statement to authorities providing Bassett with an alibi for the night of the murders, and Bassett did not want him to testify at trial; and that after a meeting with his attorney, Bassett believed his attorney could discredit Jessie’s testimony and therefore changed his intended victim to Burns. (App. 75-76).

Bassett was in the Bartholomew County Jail awaiting trial on four counts of murder. Doug, the second witness, also testified to the same facts without objection from Bassett. Doug also testified, without objection and as reflected above, that Bassett originally offered to pay him to kill Bassett's nephew, Jessie, because he did not want Jessie to testify at his trial. Doug further testified, without objection, that after Bassett met with his attorney, Bassett told him that he believed his attorney could discredit Jessie's testimony and, therefore, instead of having Doug kill Jessie, Bassett wanted Doug to kill Burns. Doug underwent an extensive and vigorous cross-examination about his bias and his possible motive for fabrication.

Before Lisa took the witness stand, the State noted its previous memorandum to the trial court on the admissibility of testimony by Lisa regarding "prior statements [Doug] made to her . . . while they were yet still in the jail." (Tr. 319). Bassett objected, arguing that no exception to the hearsay rule allowed such testimony. The trial court again deferred ruling.

Lisa testified without objection that she first met Bassett when she was in jail in late 2004, and that he was then awaiting trial on four counts of murder. Lisa was asked whether during her incarceration, had Doug "share[d] with" her "any conversations that he had with Bob Bassett?" (Tr. 330). Bassett objected, on the grounds of hearsay. The trial court ruled that her testimony was "admissible under eight oh one," as argued by the State. (Tr. 331). The State, in its memorandum on the subject, had argued that her testimony was admissible pursuant to Evidence Rule 801(d)(a)(B). Lisa testified that during their fall 2004 incarceration, Doug had told her that Bassett "had offered to pay

him to eliminate his nephew, Jessie Bassett” because he didn’t want him to testify at his trial. (Tr. 333). Lisa further testified that Bassett had later “changed his mind” and wanted Doug “to kill Kathleen Burns” because “she knew too much about his case.” *Id.* Doug told her that Bassett said he would get the money from his sister, who was holding his money for him. Lisa testified that on the day Doug posted bail and was released, Bassett “came to the hole” in the common cell wall and told her that he had already talked to Doug at home, and she “could call him now.” (Tr. 335). Lisa testified that she then called Doug, and he confirmed that Bassett had already called him.

The five recorded conversations between Bassett and Doug on December 19 –21, 2004, were played for the jury. Also, Carl Williams testified that after Doug was released on bond on December 13, 2004, he was housed in the cell with Bassett until early January of 2005. Williams testified that in the latter half of December, Bassett “had a very concerned look on his face” after a telephone conversation. (Tr. 366). Williams asked what was wrong, and Bassett “said you know, all of my problems would be solved if somebody’d just bash her head in with a baseball bat.” *Id.* Williams asked whom he meant, and Bassett answered, “Burns.” *Id.*

After a four-day trial, the jury returned its verdict finding Bassett guilty of conspiracy to commit murder, a class A felony. It further found that Bassett was an habitual offender.

STATEMENT OF THE CASE

1. Fundamental Error

Bassett first argues that the trial court “committed fundamental error”² when it admitted evidence that he “was incarcerated at the time of the alleged offense awaiting trial on four counts of murder” because the probative value of that evidence “was substantially outweighed by its unfair prejudice.” We disagree.

As the State correctly notes, and as reflected above, Bassett did not object when the witnesses testified that he was in jail awaiting trial on four counts of murder. It has long been the law that the failure to contemporaneously object at trial constitutes waiver of review unless an error is so fundamental that it denied the accused a fair trial. *See Baer v. State*, 866 N.E.2d 752, 763 (Ind. 2007); *Mitchell v. State*, 455 N.E.2d 1131, 132 (Ind. 1982). “Fundamental error is an extremely narrow exception ‘and applies only when the error constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.’” *Baer*, 866 N.E.2d at 764 (quoting *Mathews v. State*, 849 N.E.2d 578, 587 (Ind. 2006)).

The trial court has inherent discretionary power in the admission of evidence. *McManus v. State*, 814 N.E.2d 253, 264 (Ind. 2004), *cert. denied*. The trial court’s decision regarding the admissibility of evidence is reviewed only for an abuse of that discretion. *Id.* An abuse of discretion occurs when the trial court’s decision is clearly erroneous and against the logic and effect of the facts and circumstances before the court.

² Although Bassett claims “fundamental error,” he neither defines that legal concept nor provides authority thereon.

Saunders v. State, 848 N.E.2d 1117, 1122 (Ind. Ct. App. 2006) (citing *Carpenter v. State*, 786 N.E.2d 696, 702-03 (Ind. 2003)).

Indiana Evidence Rule 404(b) forbids admitting evidence of “other crimes, wrongs, or acts . . . to prove the character of a person in order to show action in conformity therewith.” However, the Rule then provides that such evidence “may” be “admissible for the purpose[.]” of proving “motive.” *Id.* Thus, evidence is excluded under Evidence Rule 404(b) “only when it is introduced to prove the ‘forbidden inference’ of demonstrating the defendant’s propensity to commit the charged crime.” *Herrera v. State*, 710 N.E.2d 931, 935 (Ind. Ct. App. 1999) (citing *Hardin v. State*, 611 N.E.2d 123, 128 (Ind. 1993)). Further, we have found that evidence of uncharged misconduct which is probative of establishing the defendant’s motive and “which is ‘inextricably bound up’ with the charged crime is properly admissible” under Evidence Rule 404. *Herrera*, 710 N.E.2d at 935 (citing *Utley v. State*, 699 N.E.2d 723, 728-28 (Ind. Ct. App. 1998), *trans. denied*).

That Bassett was in jail facing imminent trial on charges that he killed four persons³ was evidence that he had motive to engage in a conspiracy to kill (1) a witness whose testimony he feared in the trial on those charges, and (2) the person who had been actively prosecuting him on those charges for the past six years. The pending four murder charges were also inextricably bound up with the evidence that Bassett feared

³ We note that no details of the charged murders were ever specified or even alluded to in any way. The jury heard nothing more than the fact that Bassett was awaiting trial on four charges of murder.

Jessie's incriminating testimony against him and Burns' ability to prosecute him, and thought that he would benefit from Burns' murder.

However, even evidence which otherwise may be admissible may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or needless presentation of cumulative evidence. *Herrera*, 710 N.E.2d at 935 (citing Evid. R. 403 and *Hardin*, 611 N.E.2d at 127). Weighing the probative value of the evidence against the possible prejudice of its admission is a matter within the trial court's discretion, and its ruling in that regard is reviewed only for an abuse of discretion. *Herrera*, 710 N.E.2d at 935.

In *Herrera*, the defendant argued on appeal that that his conviction on conspiracy to commit murder should be reversed because "witnesses were permitted to testify regarding the murder for which Herrera was incarcerated at the time of the charged conspiracy." *Id.* We held that this evidence "was relevant to explain his motive for engaging in the conspiracy to murder witnesses who were to testify against him in that case." *Id.* (citing Evid. R. 404(b)). Further, we found that Herrera's argument that the evidence should have been excluded pursuant to Evidence Rule 403 because the risk of prejudice outweighed its probative value could "not prevail" under the circumstances presented. *Id.* at 937. Specifically, the evidence that Herrera had been charged with murder was not offered for the sole and improper purpose of proving that Herrera had acted in conformity with a propensity to commit the crime of conspiracy to commit murder. Moreover, the evidence was "highly probative of (if not essential to prove) Herrera's motive for engaging in the charged conspiracy." *Id.* Thus, we found no error

in the “admission of evidence that Herrera had been incarcerated on a charge of Murder at the time of the conspiracy to commit Murder.” *Id.*

We find the reasoning and the law of *Herrera* directly on point with this case. The fact that Bassett was awaiting trial on four counts of murder was highly probative of his motive for engaging in a conspiracy to kill Jessie, a witness who was to testify against him in the imminent trial of that case, and Burns, who had actively prosecuted that case for the past six years. If Bassett had preserved this issue by objecting at trial, we would have found no error in the admission of this evidence. Accordingly, we find no fundamental error.

2. Hearsay Testimony

Bassett argues that the trial court’s admission of Lisa’s testimony recounting out-of-court statements by Doug was error because “the trial court did not specify which exception the hearsay was being admitted under.” Bassett’s Br. at 17. We disagree.

As indicated above, the State had asserted in its memorandum of law and argued to the trial court that such testimony by Lisa was consistent with the hearsay exception found at Evidence Rule 801(d)(1)(B). The trial court ruled that she could so testify “under eight oh one” as argued by the State. (Tr. 301). Thus, the trial court did indicate its basis for admitting her testimony.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. *See* Ind. Evid. R. 801(c). Generally, hearsay is inadmissible. *See* Evid. R. 802. However, a statement is not hearsay if it meets the requirements of Indiana Evidence

Rule 801(d). *Stephenson v. State*, 742 N.E.2d 463, 473 (Ind. 2001), *cert. denied*.

Specifically, Indiana Evidence Rule 801(d)(1)(B) provides that a statement

is not hearsay if [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is . . . consistent with the declarant’s testimony, offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive, and made before the motive to fabricate arose.

Thus, this rule “encompasses efforts to rebut an express or implied charge of improper motive” as well as “a charge of recent fabrication.” *Id.* 474. Trial court rulings on the admissibility of arguable hearsay statements are reviewed for abuse of discretion. *Stephenson*, 742 N.E.2d at 473.

In his opening remarks, Bassett’s counsel repeatedly asked the jury to consider Doug’s motivation. His counsel’s opening remarks suggested that Doug alone had “hatched” the account of Bassett asking him to kill in exchange for money, that there was “no agreement” or participation by him in any such “plot.” (Tr. 198, 199, 198). During cross-examination of Doug, Bassett’s counsel repeatedly asked questions which implied that Doug’s desire to obtain his own release and that of Lisa had motivated him to fabricate the allegations of Bassett’s involvement in a conspiracy to commit murder. We agree that Bassett’s counsel subjected Doug to a “withering cross-examination about his bias and motive for fabricating.” (Tr. 319). At one point, Bassett’s counsel even asked Doug whether he “made . . . up” his account. (Tr. 295). The foregoing established an “express or implied charge of motive” by Doug. *Stephenson*, 742 N.E.2d at 474. Hence, Lisa’s testimony of prior out-of-court statements by Doug that were consistent with his trial testimony were admissible pursuant to Rule 801(d)(1)(b) “to rebut” the “charge of

recent fabrication.” *Id.* Accordingly, we find no abuse of discretion by the trial court in this regard.

3. Sufficiency of the Evidence

Bassett also argues that the evidence is insufficient to sustain his conviction for conspiracy to commit murder. He claims that there is no evidence that he and Doug “had a meeting of the minds to enter into a deliberate agreement to commit murder” because Doug never intended to kill Jessie or Burns; or that he “committed any overt act in furthermore [sic] of the alleged conspiracy.” Bassett’s Br. at 12. We are not persuaded.

When reviewing the sufficiency of the evidence to support the conviction, appellate courts must consider only the probative evidence and reasonable inferences *supporting* the verdict. It is the fact-finder’s role, not that of appellate courts, to assess witness credibility and weigh the evidence to determine whether it is sufficient to support a conviction. To preserve this structure, when appellate courts are confronted with conflicting evidence, they must consider it most favorably to the trial court’s ruling. Appellate courts affirm the conviction unless no reasonable fact-finder *could* find the crime proven beyond a reasonable doubt. It is therefore not necessary that the evidence overcome every reasonable hypothesis of innocence. The evidence is sufficient if an inference may reasonably be drawn from it to support the verdict.

Drane v. State, 867 N.E.2d 144, 146-47 (Ind. 2007) (quotations and citations omitted, emphasis in original). Bassett’s argument asks that we weigh evidence and assess witness credibility, which we cannot do. *Id.*

We first note, as correctly asserted by the State, that for a conspiracy charge, the State need not prove a “meeting of the minds” whereby the co-conspirator intended to perform the act conspired to be committed. *See Garcia v. State*, 394 N.E.2d 106 (Ind. 1979). Thus, to “sustain a conspiracy conviction, the evidence must show that the

defendant had the intent to commit the felony, entered into an agreement with another to commit a felony, and performed an overt act in furtherance of the agreement.” *Shane v. State*, 716 N.E.2d 391, 397; *see also* Ind. Code §§ 35-42-1-1(1), 35-41-5-2.

The State’s opening argument indicated that evidence would establish that Bassett wanted a certain victim dead, and that he reached an agreement with Doug to accomplish that killing. In the charging information, the State alleged that Bassett

performed at least one of the following overt acts:

- (1) He contacted [Doug] immediately upon [Doug’s] release from jail on bond in an attempt to induce [Doug] to execute the agreement;
- (2) He attempted to secure financing to make payment to [Doug] in accordance with the agreement;
- (3) He knowingly misrepresented to [Doug] his ability to secure financing to make payment to [Doug] in order to fraudulently induce [Doug] to execute the agreement.

(App. 6).

The evidence at trial showed that while Bassett and Doug shared a cell, Bassett approached Doug with the proposition that Doug kill a specific victim in exchange for money from Bassett to post Lisa’s bond. Immediately before Doug’s release, Bassett reminded him of their discussion that if he were to kill Burns, that Bassett would provide the money for him to post Lisa’s bond. Immediately after Doug was released, Bassett called Doug and began to press him to proceed with Burns’ killing, while promising to arrange for the money to pay Lisa’s bond. Bassett attempted to get the money from his sister, who was holding his money. Bassett later told Doug that he could not get the money from his sister, because she said that she had spent it, but that if Doug would proceed with the killing of Kathleen Burns, he would provide him money later. Bassett

specifically warned Doug not to talk about the matter on the phone. Subsequent to one of his telephone conversations, Bassett told his cellmate Williams of his desire for someone to “bash [Burns’] head in with a baseball bat.” (Tr. 366).

This evidence was sufficient for the jury to have drawn the reasonable inference that Bassett had the intent to murder Kathleen Burns, entered into an agreement with Doug to murder her, and performed at least one overt act in furtherance of the conspiracy to commit that murder. Therefore, Bassett’s argument must fail.

4. Ineffective Assistance

Bassett’s final argument is that he did not receive adequate legal counsel as guaranteed by the Sixth Amendment. Specifically, he asserts that his counsel provided ineffective assistance by failing (1) to file a written response to the State’s memorandum of law in support of the pretrial evidentiary hearing; (2) to object to the State’s use of evidence that Bassett was in jail awaiting trial on four counts of murder; (3) to object to hearsay evidence provided by Doug and to request a trial court finding that a conspiracy existed before admitting such evidence; and (4) to request an admonishment and/or limiting instruction as to the evidence that Bassett was in jail awaiting trial on four counts of murder. Having presented these assertions of his trial counsel’s inadequacy, and acknowledging that it is his “burden to show” that his counsel was “deficient and that deficiency rose to a level that it violated an objective standard of reasonableness,” Bassett proceeds with no analysis that would make such a showing but simply leaps to the conclusion that he “was prejudiced” by the cumulative asserted shortcomings. Bassett’s Br. at 23, 24.

To prevail on a claim of ineffective assistance of counsel, Bassett must show that (1) counsel's performance fell below an objective standard of reasonableness based upon prevailing professional norms, and (2) the deficient performance resulted in prejudice, *i.e.*, there is a reasonable probability that the result of the trial would have been different but for counsel's unprofessional errors. *Grinstead v. State*, 845 N.E.2d 1027, 1031 (Ind. 2006) (citing *Strickland v. Washington*, 466 U.S. 668, 687-88, 694 (1984)). A claim of ineffective assistance must overcome the strongest presumption of adequate assistance of counsel. *Thomas v. State*, 797 N.E.2d 752, 754 (Ind. 2003) (citing *Bieghler v. State*, 690 N.E.2d 188, 194 (Ind. 1997), *cert. denied* 525 U.S. 1021).

As to Bassett's claim that his counsel was ineffective for failing to file a written response to the State's memorandum of law in support of its motion for a pretrial evidentiary hearing, Bassett presents no argument whatsoever as to what such a memorandum should have argued. Hence, he cannot show a reasonable probability that such a memorandum would have produced a different result at trial. *Grinstead*, 845 N.E.2d at 1031.

As to his claim that counsel was ineffective for having failed to object to the admission of evidence that he was awaiting trial on four counts of murder, we have already concluded that it was within the trial court's discretion to have overruled such an objection. Thus, again, he cannot make the necessary showing of prejudice. *Id.*

In his third claim of ineffective assistance, Bassett faults counsel for having failed to object to hearsay testimony by Doug, but he fails to specify or identify any such inadmissible hearsay. Consequently, there is no appellate argument thereon for us to

address. In the second clause of this claim, and equally undeveloped, is Bassett's assertion that counsel was ineffective for having failed to request the trial court to make a finding that a conspiracy existed before admitting co-conspirator hearsay testimony. Absent the necessary showing that such a request on the part of Bassett's trial counsel would have produced a different result at trial, this claim must also fail. *Grinstead*, 845 N.E.2d at 1031.

Finally, Bassett asserts that counsel was ineffective for not requesting that the trial court admonish and/or give a limiting instruction regarding the jury's consideration of the fact that he was in jail awaiting trial on four counts of murder. Bassett argues that he "was entitled to" such an instruction, but cites no authority for that proposition. Further, the law does not declare "ineffective" actions taken by counsel as part of trial strategy, *see, e.g., Hollins v. State*, 790 N.E.2d 100, 109 (Ind. Ct. App. 2003), *trans. denied*, and counsel may very well have determined that an instruction would highlight the fact that Bassett had been charged with four counts of murder. Moreover, as earlier noted, there was no testimony at trial and no argument by the State that provided any details whatsoever about the murders he was alleged to have committed. Thus, we do not find a reasonable probability that there would have been a different result at trial if Bassett's counsel had requested a limiting instruction to the jury concerning its use of such evidence as to Bassett's pending murder charges. *Grinstead*, 845 N.E.2d at 1031.

Affirmed.

BRADFORD, J., concurs.

BAKER, C.J., dissents with separate opinion.

**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT J. BASSETT, JR.,)

Appellant-Defendant,)

vs.)

STATE OF INDIANA,)

Appellee-Plaintiff.)

No. 03A01-0708-CR-368

BAKER, Chief Judge, dissenting.

I respectfully dissent, as I cannot agree that the State successfully proved that Bassett committed an overt act in furtherance of the conspiracy. As the majority observes, the State attempted to show that the following act or acts satisfied such a requirement: (1) Bassett contacted Johnson after Johnson's release from jail; (2) Bassett attempted to secure financing to pay Johnson under the agreement; or (3) Bassett knowingly misrepresented to Johnson his ability to secure financing to pay Johnson in order to fraudulently induce Johnson to execute the agreement to kill Burns. Appellant's App. p. 6.

In my view, the above evidence indicates that Bassett was attempting only to renegotiate the agreement and was not implementing it with an overt act. In essence, the the evidence established that after Bassett learned that his sister had spent the money that

was to be used to pay Johnson, Bassett sought to change the terms of the agreement so he could pay Johnson in the future. I therefore cannot agree that the State proved beyond a reasonable doubt that Bassett performed an overt act in furtherance of the alleged conspiracy as required by Indiana Code section 35-41-5-2. As a result, I would reverse Bassett's conviction.